Supreme Court, U.S.
FILED
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No. 87-626

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL N. SHERIDAN and MARY A. SHERIDAN,
Petitioners,

v.

THE UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 16, 1987
CERTIORARI GRANTED JANUARY 19, 1988

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RELEVANT DOCKET ENTRIES

DATE	No.	PROCEEDINGS
1985		
Feb. 21	1	Complaint
" "	—	Magistrates Notice, LR10A to attorney for plaintiff.
" "	2	Summons issued. (cc, Magistrates Notice to attorney for plaintiff for service on U.S. Government, 60-day summons)
Apr. 22	3	ANSWER.
" "	4	Motion of Defendant to Dismiss and Memorandum. (c/s)
" 30	5	Scheduling Order (Murray, J.) and Attachment. (C/M by Chambers 4/30/85) (EOD 5/1/85 feh)
May 6	6	Opposition of Plaintiffs to Motion of Defendant to Dismiss and Proposed Order. (c/s)
" 20	7	Response of Defendant to Opposition of Plaintiffs to its Motion to Dismiss. (c/s)
Oct. 25	8	Motion of Defendant to postpone pretrial conference and to Compel Discovery. (c/s)
" 30	9	Order (Murray, J.) "Amending" Scheduling Order, as therein more particularly set forth. (C/M 10/30/85 Clk) (EOD 10/30/85 Clk)
Nov. 5	10	Supplemental memorandum of Plaintiff in opposition to Motion of Defendant to Dismiss and attachment. (c/s)
" 18	11	Response of Defendant to Supplemental Memorandum of Plaintiff in Opposition to Motion of Defendant to Dismiss. (c/s)
Dec. 10	12	Memorandum and Order (Murray, J.) (C/M 12/10/85 Clk) (EOD 12/11/85 Clk)

DATE	No.	PROCEEDINGS
1985		
" "	13	Judgment (Clerk) "GRANTING" Motion of Defendant to Dismiss. (C/M 12/10/85 Clk) (EOD 12/11/85 Clk) Closed file
1986		
Jan. 28	14	Notice of Appeal of Plaintiffs. (Filing fee paid) (c/m 2/27/86)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CA No. ———

MICHAEL N. SHERIDAN and
MARY A. SHERIDAN
14000 Burning Bush Lane
Silver Spring, Maryland 20906
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

COMPLAINT

[Federal Tort Claims Act]

Plaintiffs Michael N. Sheridan and Mary A. Sheridan, through counsel, hereby sue the United States for personal injury and property damage caused by the defendant's negligence.

Jurisdiction

1. This Court has jurisdiction over this action under 28 U.S.C. §§ 2671-80, the Federal Tort Claims Act, and 28 U.S.C. § 1346(b).

Venue

2. Venue is proper in this District under 28 U.S.C. § 1402(b) as the plaintiffs reside herein and the acts and omissions complained of occurred in this District.

Parties

3. Plaintiff Michael N. Sheridan is a citizen of the United States and a resident of the State of Maryland.

He is the owner of the vehicle damaged by the defendant's negligence.

4. Plaintiff Mary A. Sheridan is a citizen of the United States and a resident of the State of Maryland. She sustained personal injury, loss of income, property damage and pain, suffering and mental anguish as a result of defendant's negligence.

5. Defendant is the United States of America. The agency responsible is the United States Navy.

Factual Basis Of The Complaint

6. At approximately 9:00 p.m. on February 6, 1982, a United States Navy medical aide at the Naval Medical Center in Bethesda, Maryland fired several shots from a rifle he had stored in his quarters. At least five of the shots struck the vehicle in which plaintiffs were driving, and plaintiff Mary A. Sheridan was struck by the fragments of at least one of these bullets.

7. The medical aide's possession of firearms on the campus of the Naval Medical Center as well as his storage of these firearms in his quarters was in violation of the United States Navy's and the Naval Medical Center's rules and regulations. These rules and regulations were adopted to protect individuals such as plaintiffs from harm caused by the use of such firearms. The medical aide violated these rules and regulations while acting within the scope of his employment.

8. The medical aide had displayed instances of psychological instability in the past of such nature that the defendant knew or should have known that he posed a threat to the wellbeing and safety of others. The defendant took no steps to quell this threat.

9. The defendant knew or should have known that the medical aide was storing firearms in his quarters in violation of applicable rules and regulations and to the po-

tential detriment of individuals such as plaintiffs. The defendant took no steps to confiscate these firearms.

10. As a result of the defendant's acts and omissions, plaintiffs suffered property damage, personal injury, loss of income and pain, suffering and mental anguish.

Legal Basis Of The Complaint

11. If a private person, the defendant would be liable for negligently inflicting these damages on plaintiff under the law of the State of Maryland.

Exhaustion Of Administrative Remedies

12. Plaintiff individually timely presented their claims to the United States Navy, and the Navy, by decisions dated August 22, 1984, rejected both claims. Because of the discovery of new evidence and because of intervening facts relating to the amount of the recovery, plaintiffs here seek an additional recovery than sought below.

WHEREFORE, in consideration of the foregoing, plaintiffs seek an award against the United States in the amount of $125,000.

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Date: 2/21/85

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. HM-85-775

MICHAEL N. SHERIDAN, *et al.*,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs submit this supplemental memorandum to address the Supreme Court's recent decision in *United States* v. *Shearer*, 105 S.Ct. 3039 (1985) and to address additional facts learned through discovery. For the reasons stated herein, as well as those reasons set forth in our original opposition to defendant's motion to dismiss, defendant's motion must be denied.

1. *The Shearer Decision*

The *Shearer* case dealt with a complaint under the Federal Tort Claims Act ("FTCA") filed by the administratrix of the estate of a serviceman who had been kidnapped and murdered by another serviceman. The plaintiff alleged that the Army was negligent in failing to exercise sufficient control over the murderer and in failing to warn others that he was at large in light of his previous conviction and incarceration for manslaughter. The Third Circuit held that plaintiff's suit was not barred by the intentional tort exception of 28 U.S.C. § 2680(h), concluding that "if an assault and

battery occurred as a 'natural result' of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA." *Shearer* v. *United States*, 723 F.2d 1102, 1107 (3d Cir. 1983).

Because the victim in *Shearer* was a member of the armed services, and because the suit in essence challenged management decisions relating to the supervision and control of servicemen, the Supreme Court reversed, holding that the *Feres* doctrine (*Feres* v. *United States*, 340 U.S. 135 (1950)) barred recovery. On the issue of the intentional tort exception of the FTCA, however, the Court split four to four. Chief Justice Burger, along with Justices Rehnquist, O'Connor and White, concluded, as the government argues here, that "the phrase 'arising out of assault [or] battery' is broad enough to encompass claims sounding in negligence." 105 S.Ct. at 3043. Justices Brennan, Blackmun, Stevens and Marshall concurred only as to the *Feres* aspect of the case, however, specifically declining to join in the intentional tort aspect of the decision. *See* 105 S.Ct. at 3044. Justice Powell took no part in the decision of the case. Accordingly, although the Supreme Court reversed *Shearer*, it did so on grounds not applicable here and thus the breadth of the intentional tort exception has not been definitively resolved.

Even though the Supreme Court did not resolve the issue in *Shearer*, the differences between this case and *Shearer* are such that even under the broad reading of § 2680(h) recovery would be allowable here. In *Shearer*, the complaint was that the Army failed adequately to discipline and supervise an enlisted man with a known propensity for violence. Here, while plaintiffs have alleged that defendant was negligent in failing to restrain someone with Mr. Carr's known instability, they also have alleged that defendant was negligent in allowing, contrary to its own regulations, the storage of weapons

and ammunition on the campus of the Navy Medical Center.[1] Under Maryland law, violation of a statute designed to protect person or property constitutes negligence *per se* where such violation was a proximate cause of the injury. *J. Aron & Co., Inc.* v. *Service Transportation Co.*, 486 F. Supp. 1070, 1075-76 (D. Md. 1980). Since Mr. Carr's possession of the firearms was the *sine qua non* of plaintiffs' injuries, his possession of the weapon and defendant's tolerance of the storage of the firearms in violation of its regulations after it knew that he possessed such weapons constitute negligence *per se*.

Even under Chief Justice Burger's broad reading of the intentional tort exception in *Shearer*, the government would be liable when it is negligent *per se* and a reasonable and probable consequence of its negligence is that an intentional tort will be committed. Chief Justice Burger predicated his conclusion regarding the breadth of the intentional tort exception on the intent of Congress. Yet he also cited with approval, and thus consonant with Congress' intent, that line of cases holding that the government will be liable for the intentional torts of non-government employees precipitated by the government's negligence, as well as the intentional torts of federal employees whose status as employees is coincidental and unrelated to the commission of the intentional tort.[2] Chief Justice Burger thus concluded that

[1] In answers to interrogatories and in response to document requests, defendant has conceded that United States Navy and Navy Medical Center regulations prohibit the storage of weapons on base, that all military personnel are responsible for reporting violations of this and other regulations to the appropriate authorities, and that before the shooting incident weapons and ammunition were observed in Mr. Carr's quarters.

[2] In *Fair* v. *United States*, 234 F.2d 288 (5th Cir. 1956), for example, the individual who was able to commit the intentional tort happened to be a government employee, but his status as an employee was wholly unrelated to the commission of the tort. Specifically, the tortfeasor was an Air Force Captain who had been

Congress intended to waive the sovereign immunity of the United States in cases where intentional torts are committed as a result of the government's negligence and the tortfeasor's status as an employee is immaterial to the commission of the tort.

In this case, had it been a patient rather than a federal employee who battered plaintiffs with Mr. Carr's unlawfully possessed weapon, the government's liability would go unquestioned. Yet the fact that it was Mr. Carr, and not someone else, who catalyzed the government's negligence into injury is inconsequential. The purpose of defendant's regulation prohibiting the storage of weapons is to protect person and property;[3] since a reasonable and probable consequence of violation of this regulation is that someone will be injured—either accidentally or intentionally, and either by a federal employee or a non-federal employee—how and by whom the injury is inflicted is immaterial. By its *per se* negligence the government subjected plaintiffs to risk, and here, unlike the situation in *Shearer*, the perpetration of the tort is unrelated to the status of the perpetrator as a federal employee. The government cannot escape liability for its *per se* negligence by the happenstance that the person who actuated its negligence was a federal employee.[4]

released from a federal hospital. The court's reasoning did not turn on his status as a federal employee: had he been the spouse of an Air Force officer, for example, the same result would have ensued.

[3] As the Fifth Circuit observed in construing a similar regulation, "the precautionary measures were intended to minimize accidents and to prevent injury to persons: they were for the benefit of the public, including [the victim.]" *Underwood* v. *United States*, 356 F.2d 92, 98-99 (5th Cir. 1966).

[4] In every case applying the intentional tort exception, as well as in *Shearer*, the probable consequence of the government's alleged negligence was that a *federal employee* would injure someone. *See, e.g., Wine* v. *United States*, 705 F.2d 366 (10th Cir. 1983) (failure

2. *Facts Revealed In Discovery*

Through the discovery process, plaintiffs have uncovered additional facts which demonstrate the government's negligence and which are pertinent to defendant's motion to dismiss. Specifically, through examination of the records of the court martial of Mr. Carr, plaintiffs have discovered facts concerning the events leading up to plaintiffs' injuries, which are germane to the issues presented in defendant's motion.[5]

After Mr. Carr had finished his shift on February 6, 1982, he began drinking. Before, during, and after having dinner, Mr. Carr drank a liter or two of wine, a half pint of rum and at least four mixed drinks. At some point in the evening, Mr. Carr packed some possessions, including a rifle and ammunition, into a uniform bag and left his quarters. Between 8:45 and 9:00 p.m., three naval personnel observed Mr. Carr lying face down on the concrete floor in the old hospital building. Because these three corpsmen recognized that Mr. Carr was unconscious, or barely conscious, they proceeded to

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to prevent off-duty serviceman from committing battery); *Naisbitt* v. *United States*, 611 F.2d 1350 (10th Cir.), *cert. denied*, 449 U.S. 885 (1980) (same); *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981) (failure to prevent mail carrier from committing battery). In contrast, in those cases (cited with approval in *Shearer*) in which the intentional tort exception *was not* applied, the probable consequence of the government's negligence was that someone, perhaps a federal employee and perhaps not, would injure someone else. *See e.g., Hicks* v. *United States*, 511 F.2d 407 (D.C. Cir. 1975) (patient released from federal hospital committed battery); *Rogers* v. *United States*, 397 F.2d 12 (4th Cir. 1968) (individual assaulted by former federal employee).

[5] Attached hereto is the testimony of Hospitalman Christopher D. Hunter given at Mr. Carr's court-martial. Other portions of the court-martial record, including the testimony of other corpsmen and argument of counsel, corroborate Mr. Hunter's testimony. For purposes of this opposition, therefore, plaintiffs' submit only his one excerpt.

escort him to the hospital emergency room. Two of the corpsmen supported Mr. Carr and another took the bag containing the rifle and ammunition. Mr. Carr was unable to support himself and the corpsmen had a difficult time transporting him to the emergency room. Several times along the way Mr. Carr slipped from their grasp and fell to the floor, and, apparently on more than one occasion, Mr. Carr fell head-first down a flight of concrete stairs.

During the journey to the emergency room, Mr. Carr questioned the corpsmen about the whereabouts of his bag. He was told that one of the corpsmen was carrying it. Ultimately, the three corpsmen and Mr. Carr arrived at a set of double doors which separated the building they were in from the emergency room. To their surprise, these doors were locked. Thus, the corpsmen began to bring Mr. Carr around to the other side of the building. At this point, Mr. Carr, still intoxicated to the point of semiconsciousness and reeling from having fallen down several flights of concrete steps, broke free from the two corpsmen holding him and grabbed his bag back from the third corpsman. Mr. Carr reached into his bag and revealed the barrel of a rifle. The three corpsmen, surprised and shocked but not scared, fled.[6] Later that evening, Mr. Carr fired several shots at plaintiff.

Plaintiffs' complaint alleges that defendant was negligent in failing to restrain and control a medical aide who it knew was unstable. While this allegation is similar in nature to that in *Shearer*, in light of the foregoing facts it takes on an entirely new dimension. Whereas in *Shearer* the government's negligence could

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[6] Not only were these three corpsmen negligent in allowing Mr. Carr to escape, particularly given that they observed the rifle barrel and were aware of his impaired condition, but further they were negligent in failing to report this incident to the appropriate authorities so that Mr. Carr could be apprehended before he harmed himself or others.

only have resulted in a federal employee committing an intentional tort, the government's negligence in this case is unrelated to Mr. Carr's status as a federal employee. That is, had it been a non-federal employee rather than Mr. Carr who the three on-duty corpsmen found in a drunken stupor and yet failed to restrain, the government's liability would be unquestioned. The government cannot be absolved of liability because of the fortuity that the individual who it negligently failed to restrain was a federal employee.

In arguing that the *Panella* line of cases (*Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954)) was not inconsistent with the result it urged, the government conceded in its brief to the Supreme Court in *Shearer* that

> [i]n some of the cases, the tortfeasor was, for example, a dangerous mental patient who also happened to be a federal employee; but the source of the government's duty to supervise him was his status as a patient, not his status as an employee.

Brief for the United States at 22 n. 5 (excerpt attached). Here, the government's duty to supervise Mr. Carr arose not from his status as an employee, but instead from his presence in the old hospital building in an unconscious state, and, more particularly, from his possession of a firearm while on hospital grounds and in an impaired state. In light of these facts, and the Solicitor General's concession in *Shearer*, the intentional tort exception of § 2680(h) cannot bar plaintiffs' claims here.

3. *Conclusion*

For the foregoing reasons, and for those reasons stated in our original opposition to defendant's motion to dismiss, plaintiffs submit that defendant's motion is without merit. Accordingly, plaintiffs request that defendant's motion be denied and this case proceed to trial.

Respectfully submitted,

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Date: Nov. 1, 1985

ORIGINAL

VERBATIM

RECORD OF TRIAL

(and accompanying papers)

of

CARR, ROBERT W. 214-82-9923 HN

U.S. Navy

National Naval Medical Center, Bethesda, Md.

By

GENERAL COURT-MARTIAL

Convened by Commanding Officer

National Naval Medical Center, Bethesda, Md.

Tried at

NAVLEGSVCOFF WASH DC on

24 April, 20, 21 & 24 May 19....

Volume I of II

[Preliminary questions by TC:]

Q. For the record would you please state your name, your rate and your current duty station?

A. Yes. My name is HN Christopher Dwight Hunter, NNMC.

MJ: Please speak up because the court members are unable to hear you, Hunter. Speak into the microphone.

WIT: HN Christopher Dwight Hunter, NNMC, Bethesda, Maryland.

Q. And do you know the Accused in this case?

A. Yes, I do. I recognize him.

Q. So you see him present in court today?

A. Yes, sir.

Q. And what is his name?

A. Robert CARR.

TC: Let the record reflect the witness has correctly identified the Accused. Your witness, counsel.

DIRECT EXAMINATION

[Questions by DC:]

Q. Hospitalman Hunter, are you on active duty in the U.S. Navy?

A. Yes, sir.

Q. Hospitalman Hunter, you've indicated that you could recognize Hospitalman CARR. Is he the same individual you saw on 6 February 1982?

A. Yes, sir.

Q. Could you explain, please, to the court when you first noticed Hospitalman CARR on 6 February?

A. It was on the first deck of the old hospital near our disbursing office.

Q. Do you have an idea what time it was?

A. It was between . . . I'll say between 2045 and 2100.

Q. And how did he appear to you when you saw him at that time?

A. He was just laid out on the deck.

Q. And were you with other people at the time?
A. Yes, sir.
Q. Who were they?
A. HN Jackson and HN Hoffman.
Q. When you came across Hospitalman CARR and he was laid

• • • •

Q. A blue garment bag?
A. Yes, sir.
Q. What happened to that blue garment bag; did someone take it from him?
A. Yes, sir, HN Hoffman was carrying the bag.
Q. And what did you attempt to do for Hospitalman CARR?
A. Me and HN Jackson just attempted to try to take him over to the ER.
Q. Did anything stop you from going into the ER?
A. Yes, sir.
Q. What was that?
A. The doors were locked.
Q. These are doors to the hallway?
A. Yes, sir, to that hallway that leads over to the ER.
Q. To your knowledge had they been locked before?
A. Not that I can really remember.
Q. Were you surprised at all to find them locked?
A. Yes, I was.
Q. What did you do in response to finding these doors locked?
A. Well, I was upset just a little bit but then we just tried to take him around the other way.
Q. You say this blue garment bag was held by the other hospitalman?
A. Yes, sir.
Q. And what happened to it ultimately?
A. He got it back.
Q. Hospitalman CARR?
A. Hospitalman CARR.

Q. Had he inquired about this blue garment bag that someone else was carrying?
A. Yes. Once we got downstairs and we couldn't get him through the doors that led to the ER.
Q. And how is it that he got it back from you from the other hospitalman?
A. Well, we didn't have too tight of a security grip on him, so he just broke himself away and got the bag back.
Q. To your knowledge was anything taken out of the bag?
A. I was told at a later time that it was a rifle that he had acquired. We seen him reach into the bag and all I seen was just a barrel.
Q. And what did you do next?
A. We just got out of Dodge.
DC: Thank you, Your Honor, I have no other questions.

CROSS EXAMINATION

[Questions by TC:]

Q. Hospitalman Hunter, when you saw the barrel come out of the bag, what were your feelings at that time?
A. I was surprised.
Q. Anything else?
A. Shocked, but I was not scared.
Q. What did you do?
A. The other two hospitalman did run. I moved the wrong way. I ran towards the exit where it was locked, but I just stood behind the wall.
Q. And you didn't see him again that night, did you?
A. No, no more.
Q. But you did run when you saw that barrel come out of the bag?
A. I did run.
TC: No further questions.
DC: I have no other questions, Your Honor.

MJ: Questions by the court?

[Negative responses from all court members.]

MJ: Hospitalman Hunter, you're excused.
WIT: Thank you, sir.

[The witness withdrew from the courtroom.]

DC: Your Honor, at this time we'd like to call to the stand Hospitalman Apprentice Timothy Uram.
MJ: Proceed.

WHEREUPON,

HA TIMOTHY J. URAM, USN

was called as a witness by the defense, was duly sworn, and testified as follows:

[Preliminary questions by TC:]

Q. For the record, would you please state your name, your rate and your current duty station?

A. My names Timothy James Uram; I'm an HN; and I'm assigned to National Naval Medical Center.

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